

2002

# Brian R. Ballard v. Jamie R. Ballard : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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<b>BRIAN R. BALLARD,</b>	)	<b>BRIEF OF APPELLANT</b>
	)	
<b>Petitioner, Appellee,</b>	)	
	)	
<b>vs.</b>	)	
	)	<b>Court of Appeals No. 20020132-CA</b>
<b>JAMIE R. BALLARD,</b>	)	
	)	<b>Priority No.</b>
<b>Respondent, Appellant.</b>	)	

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**APPEAL FROM THE DECREE OF DIVORCE  
SEVENTH JUDICIAL DISTRICT COURT, GRAND COUNTY  
STATE OF UTAH, JUDGE LYLE R. ANDERSON**

---

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**FILED**  
Utah Court of Appeals

NOV - 1 2002

Paulette Stagg  
Clerk of the Court

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<b>BRIAN R. BALLARD,</b>	)	<b>BRIEF OF APPELLANT</b>
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## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction to decide this appeal pursuant to Utah Code Annotated §78-2a-3(2)(i).

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the trial court's error when it determined, contrary to the uncontroverted testimony of each of the parties that the purchase price of the peach farm was \$240,000 as opposed to \$300,000, this error requires the this Court to vacate the trial court's findings in their entirety as they relate to the determination of the separate and/or marital property issues. A trial court's distribution of property may disturbed when the evidence clearly preponderates against the finding. Noble v. Noble, 761 P.2d 1369, 1373 (Utah App. 1988).

2. Whether the trial court erred when it determined as a matter of law, and contrary to the clear weight of evidence, that the sole test for determining whether separate property merged into the marital estate is whether the donee spouse through her efforts augmented the value of the property or whether the donor spouse commingled the separate property with the marital estate. An appellate court reviews a trial court's application of law for correctness. Mortensen v. Mortensen, 767 P.2d 304 (Utah 1988). A trial court's distribution of property may be disturbed if the distribution stems from a misunderstanding or misapplication of the law resulting in substantial and prejudicial

error, the evidence clearly preponderates against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion. Noble v. Noble, 761 P.2d 1369, 1373 (Utah App. 1988). Otherwise separate property may become part of the marital estate when 1) the other spouse has by his or her efforts augmented, maintained, or protected the property; 2) when the parties have inextricably commingled the property with the marital estate so that it has lost its separate character; or 3) the owning spouse has contributed all or part of the property to the marital estate. Burt v. Burt, 799 P.2d 1166, 1169 (Utah App. 1990).

3. Whether the trial court erred when it determined, in derogation of the clear weight of evidence, that marital property neither augmented, maintained, nor protected the value of the peach farm notwithstanding the evidence that approximately one quarter of the peach farm was financed by the marital estate. An appellate court may disturb a trial court's distribution of property if the evidence clearly preponderates against the trial court's finding. Noble, *supra*, at 1373.

4. Whether the trial court erred when it determined, in derogation of the clear weight of the evidence, that the parties did not inextricably commingle the peach farm with marital property notwithstanding the evidence that approximately one quarter of the peach farm was financed by the marital estate, that the parties acquired the property subsequent to the marriage, that during the pendency of the marriage certain parcels of the peach farm were sold and donated to the marital estate, taxes were paid on the property from marital assets, and that during the pendency of the marriage the parties'

still born child was interred on the peach farm. An appellate court may disturb a trial court's distribution of property if the evidence clearly preponderates against the finding. Noble, supra, at 1373.

5. Whether the trial court erred as a matter of law, and in derogation of the clear weight of evidence, when it failed to consider whether the Mr. Ballard's actions in donating contributing all or part of the peach farm to the marital estate deprived the peach farm of its status as separate property. An appellate court may disturb a trial court's distribution of property if such distribution stems from a misunderstanding or misapplication of the law. Noble, supra, at 1373.

6. Whether the trial court erred when it determined, in derogation of the clear weight of evidence, that the peach farm failed to appreciate in value during the pendency of the marriage notwithstanding the testimony of Mr. Ballard's own expert witness and Mr. Ballard's own sworn statements to the contrary. An appellate court may disturb a trial court's distribution of property if the evidence clearly preponderates against such finding. Noble, supra, at 1373.

7. Whether the Court erred in entering its findings of fact that the Plaintiff's income was \$4,000.00 per month. The standard of appellate review is that the trial court's finding of fact will not be set aside unless clearly erroneous. Peterson v. Peterson, 181 P.2d 1305, 1307-08 (Utah App. 1991).



## **DETERMINATIVE LAW**

### **Cases:**

Burke v. Burke, 733 P.2d 133 (Utah 1987) In their exercise of discretion, trial courts need be guided by the general purpose to be achieved by a property division which is to allocate the property in a manner which best serves the needs of the parties and best permits them to pursue their separate lives. The Supreme Court has consistently held that the statutory mandate has conferred broad discretion upon trial courts in the division of property regardless of the source or time of acquisition. Generally each party shall retain the separate property brought to the marriage, however, the rule is not invariable. In fashioning an equitable property division, trial courts need to consider all of the pertinent circumstances which include, the kind of property to be divided, whether the property was acquired before or during the marriage; the source of the property; the health of the parties; the parties standard of living; respective financial conditions; needs and earning capacity; the duration of the marriage; the children of the marriage; the parties ages at time of marriage and divorce; what the parties gave up by the marriage; and the necessary relationship the property division has with the amount of alimony and child support to be awarded.

Burt v. Burt, 799 P.2d 1166 (Utah 1990). Separate property may be considered as part of the marital estate subject to division when the spouse has by his or her efforts, augmented, maintained or effected the donated, inherited property; where the property has been inextricably comingled the property with marital property so that it has lost its separate character, or where the recipient spouse has contributed all or part of the property to the marital estate.

Mortensen v. Mortensen, 767 P.2d 304 (Utah 1988). The Court should generally award separate property acquired by one spouse during the marriage to that spouse, together with any appreciation or enhancement of its value unless (1) the other spouse by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property thereby acquiring an equitable interest in it, or (2) the property has been consumed or its identity lost through co-mingling or exchanges or where the acquiring spouse has made a gift of an interest to the other spouse.

Osguthorpe v. Osguthorpe, 804 P.2d 530 (Utah 1990). Separate property may be subject to marital division if equitable principals so require.

Barber v. Barber, 792 P.2d 134 (Utah 1990). It is well settled that pre-marital or separate property may under appropriate circumstances be subject to equitable division upon divorce.

## **STATEMENT OF THE CASE**

### **A.     Nature of the Case.**

The dispute in the case before the Court focuses on issues relating to separate and marital property known by the parties as the peach farm. The Appellant, Jamie R. Ballard married the Appellee, Brian Ballard in July of 1994, and the Appellant filed for divorce in early 2001. As set forth above, this appeal presents various issues for the Court to determine, however, the Court's decision will hinge on 5 issues. First, if the Trial Court's factual findings completely misstate the uncontroverted evidence must all conclusion based upon the finding be vacated; Second, was the property (the peach farm) acquired by the parties twenty-two months after their marriage marital or separate property; Third, if the peach farm was originally separate property, did the parties by their conduct convert it to marital property; Fourth, did the Court make appropriate findings as to the division of the separate and or marital property; and Fifth, did the Court err in determining as a matter of law that once the property was determined to be separate property that the division not subject to equity. If the Court finds in Appellant's favor on any of the issues set forth immediately above, the Court should remand this case to the trial court to make appropriate findings under relevant cases.

### **B.     Course of Proceeding/Disposition at Trial Court.**

On the 29th day of November, 2000, Brian Ballard ("Appellee") filed for divorce to dissolve his marriage of approximately 6 years to Jamie Ballard ("Appellant"). The Court entered an Order on temporary relief after hearing.

The case was tried before Judge Lyle R. Anderson in the Seventh Judicial District Court on in San Juan County on November 13, 14, and 28, 2001. At the close of testimony on November 28, the Court awarded a Decree of Divorce to Brian Ballard. Jamie Ballard was awarded the care, custody and control of the parties minor children subject to visitation pursuant to the statute. Brian Ballard was then ordered to pay child support in the amount of \$756.00 per month for a period of 36 months, at which time the support shall be recalculated based upon Jamie Ballard's current income, but not less than \$100.00 per month if she is not working.

Brian Ballard was ordered to pay alimony in the amount of \$750.00 per month for a period of 36 months, at which time the alimony was to be reduced to \$250.00 for an additional 36 months.

Each of the parties was ordered to pay one-half of all medical, dental and like expenses incurred by the minor children, together with one-half of the work related expenses. Brian Ballard was awarded the income tax exemptions.

Brian Ballard was awarded the peach farm and 13 water shares as his separate pre-marital property free and clear from any claim of Jamie Ballard. Jamie Ballard was awarded the marital residence which includes \$60,000.00 in equity in the home, and was ordered to pay the property taxes and insurance incurred in connection with the home.

Brian Ballard was ordered to pay Jamie Ballard a marriage settlement in the amount of \$110,000.00, said amount to be paid within 18 months from November 28, 2001 at no interest. Brian Ballard was ordered to assume and discharge the marital

obligations, including the obligation on the ranch, improvement lien, the obligations to Bonneville, Frontier, the tax lien, the obligations on the credit cards up to \$7,000.00.

The personal property was divided by the Court. Brian Ballard was also awarded the assets of Grand Valley Construction Company, the excavation business, together with all tools, equipment and machinery, including any of those items on the property belonging to Jamie Ballard's father free and clear of any claim of Jamie Ballard. Brian Ballard was also awarded the La Sal Ranch property free and clear of any claim of Jamie Ballard.

The Court found that Brian Ballard's income was \$4,000.00 per month. The Court further found that the temporary support ordered by the Court on March 6, 2000 was excessive and the Court reduced its temporary orders consistent with alimony and child support ordered by the decree retroactive to March 6, 2000.

The Court further found that Brian Ballard brought the peach farm to the marriage, including 13 water shares and that Brian Ballard originally paid \$240,000.00 from pre-marital assets for the peach farm and water shares, and there had been no substantial increase of value of property; any appreciation of the value of property was through the market forces. The Court also found the value of the property to be essentially the same as when purchased.

The property divisions made by the Court were made without any consideration to the peach farm property, which the Court set aside as separate property not subject to the Courts equitable powers.

## **STATEMENT OF FACTS**

The facts marshaled supporting and in favor of the Court's decision are as follows:

1. The parties were married July 4, 1994. (Tr. Vol. I, p.20).
2. Two children were born as issue of the marriage. At the time of trial each resided with Jamie Ballard, their ages were 7 and 3. (Tr. Vol. I, p. 20).
3. Brian Ballard last resided in the marital home in January 6, 2000. (Tr. Vol. I, p. 21-23).
4. Brian Ballard claims he brought the farm and the Bar M Chuck Wagon business into his marriage with Jamie Ballard, and that he sold that property twenty-two months after he married Jamie Ballard. (Tr. Vol. I, p. 203, line 14-16).
5. Brian Ballard was awarded the farm and the Bar M Chuck Wagon property from his previous marriage as a result of the bifurcated proceedings on August 18, 1995, a year and 3 months after having married Jamie Ballard. (Tr. Vol. I, p. 212, lines 1-8).
6. Brian Ballard claims the value of the farm and Bar M Chuck Wagon business to the marriage was \$240,000.00. (Tr. Vol. I, p. 203, line 18; Plaintiff's Exhibit 1).
7. During the course of the Ballard's marriage, taxes were paid upon the Bar M Chuck Wagon business and farm property. (Tr. Vol. I, p. 205).
8. The farm and Bar M Chuck Wagon property which Brian Ballard claims to have brought to the marriage was sold on May 20, 1996. Twenty-Two months after Brian Ballard's marriage to Jamie Ballard. (Tr. Vol. I, p. 209, lines 1-4).

9. Brian Ballard sold the property which he had received in the previous divorce proceeding in May of 1996. (Tr. Vol. II, p. 24, line 6).
10. Brian Ballard valued the peach farm at trial for a total of \$300,000.00. He had previously claimed he purchased the peach farm at \$26,000.00 per acre for a total value of \$273,000.00. (Tr. Vol. II, p. 112, line 12).
11. On Exhibit 24, Brian Ballard valued the 133 acres at La Sal at \$300,000.00. (Tr. Vol. II, p. 42, lines 5-25).
12. Brian Ballard valued the La Sal Mountain property at the trial in this matter at \$1,300.00 per acre for a total value of \$172,900.00. (Tr. Vol I, p. 108, lines 4-5).
13. The peach farm property purchase by Brian Ballard in 1996 contained approximately 14 acres. (Tr. Vol. II, p. 44).
14. There was only 10½ acres remaining from the 1996 purchase on the farm property at the date of trial. (Tr. Vol. II, p. 43, lines 4-9).
15. The farm property was purchased for \$300,000.00 in approximately May of 1996. The parties financed the additional \$60,000.00 of the purchase price. (Tr. Vol. II, p. 184, lines 4-10 and Vol. I, p. 32, line 3).
16. Of the \$60,000.00 which was borrowed, \$30,000.00 was repaid from marital obligations. (Tr. Vol. II, p. 186, line 11-14 and Tr. Vol. I, p. 32 line 5).
17. During the course of the parties marriage, the parties paid interest payments on the \$60,000.00 debt. (Tr. Vol. II, p. 185-186).

18. Brian Ballard's expert witness paid \$60,000.00 per acre on property located in Moab for unimproved property within 2 miles. (Tr. Vol. III, p. 82, lines 16-18).

19. The said property was comparable to the peach farm property. (Tr. Vol. III, p. 83).

20. The Court stated that Brian Ballard's expert regarding the \$60,000.00 and \$40,000.00 values had solid evidence of value. (Tr. Vol. III, p. 80-81, line 2 and line 11).

**The remaining facts which do preponderate against the Court's findings are as follows:**

21. Brian Ballard had been previously married to Lenea Ballard. The previous marriage relationship ended in the Spring of 1994, however, the property settlement portion of the case was bifurcated and was not resolved until approximately August of 1995. (Tr. Vol. I, p. 24, line 24 and p. 25, lines 2, 3, 5 and p. 212, lines 6-8).

22. Brian Ballard used as an exhibit in his bifurcated proceeding a document in which he valued the farm and Bar M Chuck Wagon business at a net amount of \$112,000.00. (Tr. Vol. II, p. 13, lines 15-20, Exhibit 22).

23. In the bifurcated proceeding (Exhibit 22), Brian Ballard urged division of the at a net value of \$112,000.00. (Tr. Vol. II, p. 15).

24. Other than equipment valued at approximately \$2,000.00 the farm and chuck wagon property was the only property Brian Ballard took from his previous marriage. (Tr. Vol. II, p. 15, lines 14-22).

25. The exhibit in which Brian Ballard valued the property in the previous divorce for a net of \$112,000.00 was created by Brian Ballard's attorney. (Tr. Vol. II, p. 16).

26. Brian Ballard's ex-wife from the previous marriage received approximately equal amounts of money to the value \$140,000.00 received by Brian Ballard. (Tr. Vol. II, p. 26, lines 17-20).

27. Brian Ballard was ordered to pay \$17,000.00 of debts from his previous marriage. Those debts remained after the Ballard marriage. (Tr. Vol. II, p. 19, lines 21-24).

28. Brian Ballard believes that he brought \$240,000.00 worth of property to the Ballard marriage. (Tr. Vol. II, p. 20, lines 7-10).

29. The property which Brian Ballard claims was pre-marital property was acquired 22 months after Brian Ballard married Jamie Ballard. (Tr. Vol. II, p. 23, lines 11-13).

30. The Ballards agreed that their residence has value of \$220,000.00. (Tr. Vol. II, p. 27).

31. On April 30, 1999, Brian Ballard filed documents with the State of Utah to obtain a higher bid limit for his contractors license in which he testified that he valued his assets for more than they were really worth. (Tr. Vol. II, p. 29, Exhibit 24).

32. In the document submitted to the State of Utah (Exhibit 24) Brian Ballard estimated his assets as of December 31, 1999 of \$1,236,000.00. Brian Ballard testified



that he did not believe the value set forth in Exhibit 24 was justified. (Tr. Vol. II, p. 31, lines 13-15).

33. Brian Ballard testified that getting a high bid limit with the State of Utah justified submitting financial information to the State of Utah that knowingly inflated values. (Tr. Vol.. II, p. 32, lines 10-12).

34. Brian Ballard admitted that on several occasions he had falsely valued assets to justify the outcome he wanted. (Tr. Vol. II, p. 32, lines 18-24).

35. The Court stated that it could not put much stock in what Brian Ballard said a piece of property was worth. (Tr. Vol. II, p. 37, lines 2-8).

36. In Exhibit 24, Brian Ballard admitted that he listed the value of the parties personal residence at \$220,000.00. (Tr. Vol. II, p. 40-41, lines 16-25 and 1-4).

37. Exhibit 24, which Brian Ballard testified inaccurately valued the peach farm included a value of \$440,000.00 dollars. (Tr. Vol. II, p. 41, lines 13-15).

38. During the course of the parties marriage, approximately 6 lots were sold for between \$25,000.00 and \$37,000.00, including 1/3 acre lots were sold from the property acquired by Brian Ballard in 1996. (Tr. Vol. II, p. 46).

39. The parties used proceeds from the sale of the peach farm for payment of marital obligations. (Tr. Vol. II, p. 54, lines 15-25).

40. Brian Ballard valued the equipment purchased from Eldon Ray (in Exhibit 24) in his financial statement to the State of Utah at \$210,000.00. (Tr. Vol. II, p. 57).

41. Brian Ballard did not file personal tax returns with the Internal Revenue Service in years, 1996, 1997, 1998, 1999, and 2000. (Tr. Vol. II, p. 57-61).

42. The Eldon Ray Construction business was purchased by Brian Ballard on February 1, 1997 for \$220,000.00. (Tr. Vol. II, p. 83).

43. The Eldon Ray business in part was financed by a lien upon the parties residence. (Tr. Vol. II, p. 79, line 1, and p. 83, line 25).

44. The parties built their personal house on property carved out of the peach farm property purchased in 1996. Brian Ballard paid real property taxes on the peach farm during the course of their marriage. (Tr. Vol. II, p. 74, lines 1-4).

45. The parties jointly raised fruit on the property and kept the money as joint. (Tr. Vol. II, p. 79).

46. During the course of the parties marriage, Jamie Ballard gave birth to a still born child. (Tr. Vol. II, p. 79, line 21).

47. The still born child's body was buried on the peach farm. (Tr. Vol. II, p. 79, line 21-23 and p. 80, line 5-6).

48. The parties purchased approximately 160 acres of the La Sal Mountain property for \$180,000.00. (Tr. Vol. II, p. 87, line 17).

49. Shortly after the purchase of the La Sal Mountain property, the parties sold various lots for an average of \$2,500.00 per acre. (Tr. Vol. II, p. 87, line 25).

50. Brian Ballard used the proceeds from the sale of portions of the peach farm property for payment of marital obligations. (Tr. Vol. II, p. 90, lines 1-3).

51. The proceeds from the sale of the peach farm parcels was virtually the only marital income during the year 1998. (Tr. Vol. II, p. 90, lines 5-9).

52. The peach farm property was appraised by Brian Ballard's first expert at \$26,000.00 per acre. (Tr. Vol. II, p. 112, lines 9-13).

53. The appraisal was for a lump sum of piece of property rather than for individual lots. (Tr. Vol. II, p. 113, lines 1-6).

54. The peach farm would have had a higher value had it been appraised as if it were to be subdivided. (Tr. Vol. II, p. 114, lines 11-14).

55. Brian Ballard's first appraisal did not take in to account other sales of 1/3 acre lots which had been carved out of the property. (Tr. Vol. II, p. 114).

56. The parties also used the farm property to collateralize additional marital obligations including for payment of a pick-up truck for Brian Ballard. (Tr. Vol. II, p. 188, lines 2-7).

57. The parties lived in a second house which they constructed upon the peach farm for a period of 14 months. (Tr. Vol. II, p. 192, lines 2-8 and Vol. III, p. 48, lines 13-25).

58. The parties used a portion of the peach farm property for the purchase of the La Sal Mountain property by trading 1 lot for part of the purchase price. (Tr. Vol. II, p. 44, lines 16-17 and Vol. II, p. 47, line 19 and 22-23).

59. Jamie Ballard brought \$67,000.00 of premarital assets to the parties marriage which were used. (Tr. Vol. II, p. 210).

60. A value of \$32,000.00 for a 1/3 acre lot was ascribed to the trade for the La Sal Mountain property. (Tr. Vol. II, p. 210, line 20-23).

61. The money used to renovate the home in which the parties lived came from the water shares which were purchased with the peach farm property in 1996. (Tr. Vol. III, p. 48).

62. Jamie Ballard assisted in pouring the foundation for the cement for the edifice which the parties constructed on the farm property in which to live. (Tr. Vol. III, p. 49).

63. Jamie Ballard sold a lot which she received from her father for \$27,000.00. The proceeds were used for the purchase of the La Sal Mountain ranch property. (Tr. Vol. III, p. 50).

64. The proceeds from the sale of the peach farm were used for household purposes, including paying joint debt. (Tr. Vol. III, p. 50).

### **SUMMARY OF ARGUMENT**

In the Court's Findings of Fact and Conclusions of Law, the Trial Court found that Brian Ballard had brought certain real property known as the peach farm to the marriage, and that Brian Ballard had kept the property solely in his name except for those portions which were sold or traded. The Court ruled that the peach farm was not comingled.

The Court further found that Brian Ballard had paid \$240,000.00 from assets for the peach farm and the water shares and that there was no substantial increase in the

value of the property and that any depreciation of the value of the property was due to market forces, and that the present value of the farm at the time of the trial was the same as when purchased when reduced by the outstanding debt owing. The Court also found that Jamie Ballard had made no significant contribution to the farm which resulted in an enhancement of value, that she had not made sufficient effort on her part to increase the value of the farm.

The Courts finding of those facts was clearly erroneous on its face in that Brian Ballard did not pay \$240,000.00 as found by the Court. Rather, as the transcript clearly shows, the purchase price of the property was \$300,000.00 of which \$60,000.00 was financed by the parties. (Tr. Vol. II, p. 184, lines 4-10 and Vol I., p. 32, line 3). The debt was incurred as purchase money debt and was incurred during the course of the parties marriage.

Because the basic premise of the Courts finding was a purchase price of \$240,000.00 without financing all conclusions revolving around this finding must be vacated.

The Court's determination that the property was separate and not marital property further failed to consider the parties usage of the property to determine if separate property had become marital property based upon the parties conduct. The Court did not entertain that analysis. Notwithstanding evidence supporting that conclusion. Brian Ballard for example, admitted repeatedly at the trial that the proceeds from the sales of portions of the peach farm property he claimed were used for the support and

maintenance of the family unit, and in one year virtually his only income was from the sale of the peach farm parcels. In addition to the use of the property for supporting the marital estate, the parties buried their still born child on the property. The conduct and uses of the property manifests clear intent by the parties that it was to be their marital property.

Even if the property had been separate property as determined by the Court, the Court did not apply the principles of exception as set out in Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988), or the equitable principals demanded by Burt v. Burt, 799 P.2d 1166, 1169, (Utah App. 1990) in dividing the property.

Even if the Court had applied the principles of Mortensen and Burt, the evidential ruling would manifest an abuse of discretion because the evidence simply does not warrant such a finding.

## **ARGUMENT**

### **I.**

#### **THE COURTS FINDING AS TO THE PURCHASE PRICE OF THE PEACH FARM IGNORE THE UNCONTROVERTED TESTIMONY OF EACH OF THE PARTIES TO THE LITIGATION**

A trial court is required to make findings on all material issues; Throckmorton v. Throckmorton, 767 P.2d 121, 124 (Utah Ct. App. 1988) and the trial court must support its decision with adequate findings. Naranjo v. Naranjo, 751 P.2d 1144 (Utah Ct. App. 1988).

Section 13(B) of the Courts findings of fact states as follows:

The Petitioner originally paid \$240,000.00 from premarital assets for the farm and water share and there has been no substantial increase in the value of the property; any appreciation in the value is due to market forces; the present value of the farm is essentially the same as when purchased when reduced by the outstanding debt owing there on and the parcels sold.

The finding of the Court is not supported by the record, and is contradicted by the direct testimony of both Brian Ballard and Jamie Ballard.

Brian Ballard testified regarding the purchase price of the peach farm property as follows:

“I paid \$300,000.00 total for the farm. That included the water shares and everything. And so we -- I had to borrow that \$60,000.00 and I have borrowing (sic) that over since.”  
(Tr. Vol. I. p. 32, lines 3-6).

Jamie Ballard testified as to the purchase of the peach farm property as follows:

Question: Okay. And he purchased that property for \$300,000.00 is that correct?  
Answer: That's correct.  
Question: Ah. He testified before that he put \$240,000.00 down.  
Answer: That's, I guess that -- yeah. I guess he did.  
Question: Where did the other \$60,000.00 come from?  
Answer: We borrowed that from friends.

The plain, uncontroverted, and only evidence concerning the purchase price of the peach farm flies in the face of the Courts findings. The finding of the purchase price of \$240,000.00 is not supported by any evidence in the record.

The effect of the flawed findings on the Courts decision below must necessarily be fatal. The Courts findings as to the purchase price is the foundation for its decision to treat the peach farm as separate property.

If the Court had been cognizant of the actual purchase price of the property, that roughly one-quarter of the purchase price had been borrowed during the course of the marriage and paid on with marital property at the very least, only part of the property could have been separate property. Without correct and adequate findings on the purchase price and debt issue it is not legally possible to correctly conclude that any part of the property is separate.

## **II.**

### **THE TRIAL COURT ERRED IN FINDING THAT THE PEACH FARM WAS SEPARATE PROPERTY.**

When Brian and Jamie Ballard married in July of 1994, Brian Ballard had no assets to his name except a claim for a portion of marital property from a bifurcated divorce proceeding. Brian Ballard's claim did not become a reality until an order was rendered determining his property interest approximately 15 months after his marriage to Ms. Ballard. Mr. Ballard in that previous divorce proceeding argued that the property had a net value of approximately \$112,000.00. (See Exhibit 22). Apparently in his divorce from Lenea he wanted to value low but thereafter when he purchased the peach farm from the Ballard Family he wanted the value higher. Mr. Ballard sold the property



he received from the previous marriage for \$240,000.00. The approximate \$128,000.00 dollar difference in what he valued the property in the divorce and that which he sold it for apparently occurred over a period of approximately seven months. The peach farm was acquired approximately 22 months after the parties had been married, and was acquired for \$300,000.00, \$240,000.00 of which was paid in cash with the balance financed.

To withstand an appeal the Trial Court must make sufficient findings to justify its decision to award property as separate or married property. Burt v. Burt, (supra). Also see Throckmorton v. Throckmorton, 767 P.2d 121, 124 (Utah App. 1988), and Naranjo v. Naranjo, 751 P.2d 1144, 1147 (Utah Ct. App. 1988).

In the face of the uncontroverted evidence that the property was purchased for \$300,000.00, with \$60,000.00 of marital debt, the Courts findings cannot support its ultimate conclusion as to separate property.

The Court did not make findings as to the effect on the separate property of it having been acquired by Brian Ballard some twenty-two months after his marriage to Jamie Ballard. Where the parties use marital funds to maintain and augment the assets, the appreciated portion of the assets, if not the assets itself are the marital property. See Burt v. Burt, 799 P.2d 1169, and also Schaumberg v. Schaumberg, 875 P.2d 598 (Utah App. 1994).

The record is replete with the Courts observations that where the property is separate appreciation is immaterial and irrelevant. Because of that position it was easy to

ignore evidence provided by Mr. Ballard's own witness that comparable property had sold for between \$40,000.00 to \$60,000.00. (Tr. Vol. III, p. 80-81, line 2 and line 11).

The Court failed to even consider the appreciation of the asset as a result of its flawed finding of separate property.

If the Court would have considered the possibility that at least the appreciation to the property was a marital asset as appears contemplated by Burt and Schaumberg (supra) an additional \$252,000.00 in appreciation alone could have been potentially available for division by the Court.<sup>1</sup>

While there are a plethora of Utah cases discussing how the marital and separate property should be treated, there have not been any Utah cases that actually have clearly defined how to determine if an asset is marital or separate property. Where the property in the matter before this Court wasn't acquired until twenty-two months after the parties marriage, and was partly financed by the parties, it seems reasonable that the only separate property to which Brian Ballard should be allowed is the \$112,000.00 he took from his previous marriage. In that case in addition to the appreciation discussed herein an additional \$167,000.00 of marital property would be available for distribution.

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<sup>1</sup> \$252,000.00 is derived from taking the difference from Brian's first appraiser of \$10.5 acres at \$26,000.00 and Brian's second expert at 10.5 x the mean of \$40,000.00 and \$50,000.00.

### III.

#### EVEN IF THE PROPERTY WAS SEPARATE PROPERTY IT BECAME MARITAL PROPERTY BY ITS USE DURING THE COURSE OF THE MARRIAGE.

It is well settled that property, otherwise classifiable as separate property, may become part of the marital estate when (1) the other spouse has by his or her efforts augmented, maintained or protected the property; (2) when the parties have inextricably comingled the property with marital property so that its loss is separate character; or (3) <sup>2</sup>the owning spouse has contributed all or part of the property to the marital estate. Burt v. Burt, 799 P.2d 1167, 1169 (Utah App. 1990), Hall v. Hall, 558 P.2d 1018, 1022 (Utah App. 1993); Schaumberg v. Schaumberg, 875 P.2d 598 (Utah App. 1994).

In the matter before the Court, the Trial Court found that Jamie Ballard had not augmented or maintained the property and that the property was not comingled and simply ignored the evidence that Brian Ballard had contributed all or part of the property to the marital estate. It is clearly within the Trial Court's province to accept Brian Ballard's testimony that Jamie Ballard did not actually work on the farm.

It is the Trial Court's duty as the trier of fact to test the credibility of the evidence and decide the facts. However, the Trial Courts narrow focus on only that which Jamie actually contributed to the peach farm is in the words of the Court of Appeals in Dunn v. Dunn, 802 P.2d 1314, (Utah App. 1990).

“troublesome as it suggests a weighing only of each parties financial contribution to marriage.” “such an analysis ignores contributions of love, encouragement, companionship which elude monetary evaluation.” It also gives short shrift to spouses who contribute homemaking skills and child care.”

The Court’s narrow finding as to who actually worked on the property ignores other contributions to the marriage. The Court should have also considered those other contributions made by Jamie Ballard to the marital estate, See Dunn, supra.

The Court’s finding that the property was not comingled was apparently based upon the narrow fact that the legal title was always in the name of Brian Ballard. The finding flies in the face of the parties using the property as the financial foundation of their marriage.

The co-mingling started with the purchase of the peach farm 22 months into the marriage. Brian Ballard stated: “we – I borrowed the remaining \$60,000.00.” (Tr. Vol. p. line ). The statement speaks volumes on several levels. In all likelihood, the property could not have been purchased at all but for the post marriage marital borrowing. If one were cynical (isn’t cynicism required or at least permitted where the party has admitted to on numerous occasions to filing false financial information to suit his purposes, and hadn’t filed income tax returns for the 5 years prior to the divorce) the “we” first used by Brian Ballard in his testimony could even ben taken seriously to mean he and his wife to whom he had been married to for twenty-two months.

It was comingled when the parties first constructed from their own hands and resided in the fruit shed on the property and thereafter sold the property upon which the

fruit shed was constructed and used that sale for their marital support.

It was comingled when the parties traded part of the property for the La Sal Mountain property and encumbered it for the purpose of financing that acquisition.

It was comingled when an additional five parcels of the property were sold to support the family and the marital estate. It was comingled when Brian and Jamie interred their still born child in a homemade coffin built with Brian's hands on the property.

It was comingled when the parties paid real estate taxes from marital assets on the property.

It was comingled when the parties paid interest and principal payments on the marital purchase money debt.

The Court failed to make findings and in fact ignored the evidence that Brian Ballard had in fact contributed all or part of the property to the marital estate. The foregoing facts can lead to no other conclusion than Brian Ballard contributed the property to the marital estate. The parties in their conduct openly and notoriously used the property as their marital financial foundation. The Court's failure to make findings in light of the overwhelming evidence of contribution is an abuse of discretion. The Court of Appeals in Noble (supra) on similar facts required a finding that those acts did add up to contribution of the property to the marital estate. The Trial Court's findings of fact with relation to the peach farm are found in their entirety at paragraph 13 of the Court's finding. That paragraphs states:

The Court finds that the Petitioner brought certain real property into the marriage, which property is referred to as the farm or peach farm, together with 13 water shares. With relation to such property, the Court finds:

A. That the funds used to purchase the farm are traceable from Petitioner's previous marriage settlement; Petitioner has kept the property solely in his name, except for those parcels which were sold or traded, the proceeds of which were comingled; the remaining property known as the peach farm has not been comingled;

B. The Petitioner originally paid \$240,000 from premarital assets for the farm and water shares and there has been no substantial increase in the value of the property; any appreciation in the value of the property is due to market forces; the present value of the farm is essentially the same as when purchased when reduced by the outstanding debt owing thereon and the parcels sold.

C. The Respondent has made no significant contribution to the farm which has resulted in any enhancement of value;

D. The documentation or evidence presented by Respondent does not reflect sufficient effort on her part so as to cause an increase in the value of the property;

E. The Court believed the testimony of the water master and the receipts for the purchase of the trees and this evidence did not support Respondent's claim to have contributed significant effort on the farm;

F. The peach farm and water shares described as:

City of Moab County of Grand all of PLAT A  
& B, BALLARD SUBDIVISION

Are Petitioner's premarital property and should  
not be included as marital assets;

G. Petitioner is obligated to pay the debt owing on the peach farm as premarital debt.

Given the body of evidence to the contrary, the failure to make findings on all material issues raised by the evidence is error and an abuse of discretion.

#### IV.

#### **EVEN IF SEPARATE PROPERTY, THE COURT FAILED TO ADDRESS THE EQUITABLE ISSUES RELATING TO THE PROPERTY.**

The Utah Supreme Court in Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988) stated as follows:

“we concluded that in Utah, trial courts making equitable property division pursuant to Section 30-3-5 should in accordance with the prevailing rule in most other jurisdiction and with the division made of our own in cases generally award property acquired by one spouse by gift, inheritance during the marriage, ‘or property acquired in exchange thereof’ that spouse together with any appreciation or enhancement of its value unless . . .”

From Mortensen the question then becomes what does “general” and “unless” mean in the context of Brian and Jamie Ballard.

In Mortensen the effect of the words were general and unless permitted the Trial Court to divide marital property unequally because of the separate property issue, thus subjecting the separate property to the Court’s equitable power and in essence awarding some separate property to the spouse which had no direct legal interest.

The Supreme Court and Court of Appeals have steered clear of a rule requiring a sterile application requiring a quick and dirty separate property determination from which all other property distributions must follow.

If the Court below had avoided its rigid analysis and considered equity it could have considered that Jamie Ballard brought \$67,000.00 of value to the marriage, Brian Ballard originally brought nothing. Fifteen months after the marriage Brian Ballard received property that he personally placed a net value on at \$112,000.00. Jamie Ballard without hesitation used all of her assets to benefit the marital estate. In addition, she bore the parties two children, handled the domestic duties and was then told by her husband she didn't do enough on the peach orchard to be a full partner.

Brian Ballard on the other hand, either by design or mere accident put one piece of property in his name and then came to the Court and says, what's mine is mine and what hers is ours. The manifest effect of such conduct is not equitable and just not fair.

In Burke v. Burke, 733 P.2d 133 (Utah 1987), the Supreme Court held: when a decree of divorce is made, the Court may make such orders in relation to the . . . property . . . of the parties . . . as may be equitable. This Court has followed that principle on numerous occasions and has consistently concluded that Trial Court's have broad discretion in the division of property regardless of its source or time of acquisition. In the exercise of their discretion, trial courts must be guided by the general purpose to be achieved by a property division which is to allocate the property in a manner which best



serves the needs of the parties, and best permits them to pursue their separate lives. Reed v. Reed, 594 P.2d 871, 872 (Utah 1979).

In Burke, the Supreme Court further held:

“premarital property gifts inheritances may be viewed as separate property, and in appropriate circumstances equity will require that each party retain the separate party brought to the marriage . . . however the rule is not invariable. In fashioning an equitable property division, trial courts need to consider all of the pertinent circumstances . . . the factors generally to be considered by the amount and kind of property to be divided whether the property was acquired before or during the marriage the source of the property; the health of the parties; the parties standard of living; respective financial conditions; the needs and earning capacity; the duration of the marriage; the children of the parties; the parties ages at time of marriage and of divorce; what the parties gave up by the marriage; and the necessary relationship the property division has with alimony and child support to be awarded. . . .”

With the exception of the source of the property, the Court utterly failed to consider those personal circumstances which Burke said should be considered. In Osguthorpe v. Osguthorpe, 804 P.2d 530 (Utah 1990) the Court of Appeals consistent with Mortensen and Burt held as follows:

“however, in making equitable orders pursuant to Section 3-30-5 the Court has consistently concluded that the trial court is given broad discretion in dividing property regardless of its source or time of acquisition.”

Osguthorpe, Mortensen, and Burt, require deviation from the basic rule if equitable principles so require.” The cases in Utah set forth above simply do not permit a trial court to make a determination of separate property and divide the property without

following the Appellate Court's guidelines to consider all of the factors contemplated by equity.

The Court of Appeals in Moon v. Moon, 790 P.2d 52 (Utah App. 1990) for all practical purposes held that under circumstances similar (with regard to the financing of the property) that the appreciation is marital property.

In the matter before the Court, the Trial Court held that because of its finding on the separate property issue, appreciation need not be seriously considered. While the Court did make a finding that the property had not appreciated, the finding was not supported by evidence provided by Brian Ballard's own expert that in fact the property had appreciated.

The evidence on appreciation requires a careful analysis of the testimony of both witnesses called by Brian Ballard to establish the value of the peach orchard.

The first witness, Valle Smouse testified that the property was worth \$26,000 per acre. The value was based upon its present configuration as one large piece. (Tr. Vol. II, p. 112, lines 9-25). That appraisal did not consider that portions of the original peach orchard had been sold in 1/3 acre parcels for \$25,000.00 to \$37,000.00.

Valle Smouse also testified that if the property had been appraised as a subdivision, the value would have been higher. (Vol. Tr. II, p. 114, line 114). The appraiser also had not been told by Brian Ballard the amount for which the other lots had been sold. (supra)

Brian Ballard's second witness that testified as to the value of the peach orchard was Tom Shellenberger. Mr. Shellenberger was apparently called to testify with regard to the development possibilities for the peach orchard. With regard to development, the testimony was largely aborted for foundational reasons. (Tr. Vol. III, p. 75-77).

Mr. Shellenberger did testify though that he was personally aware of comparable pieces of property selling for between \$40,000.00 and \$60,000.00 per acre. In fact he had paid \$60,000.00 per acre for comparable property. (Tr. Vol. III, p. 82-83, lines 16-25) and 1-11).

The Courts inappropriately narrow focus on separate property prevented an analysis of appreciation, equity and fair play.

## V.

### **THE WEIGHT OF THE EVIDENCE DOES NOT SUPPORT THE COURT'S FINDING THAT BRIAN BALLARD EARNED \$4,000.00 PER MONTH**

The Court's task below regarding Mr. Ballard's earning capacity was not enviable. An analysis of the evidence demonstrates that any conclusion to which the Court came would have some relation to pulling a rabbit out of hat. Mr. Ballard testified that his income was \$5,000.00 annually. (Tr. Vol. I, p. 76, line 8). Mr. Ballard's accountants testified that Mr. Ballard's income was \$28,000.00 annually. (Tr. Vol. I, p. 150, line 13), but stated that the information was only as good as that provided to him by Brian Ballard.

Given Brian Ballard's track record, any reliance upon his testimony with regard to property value or income is not warranted.

Brian Ballard testified that he had falsely inflated his assets to obtain a higher contractor's license limit from the State of Utah. (Tr. Vol. II, p. 32, lines 10-12). He testified that he had on multiple occasions placed values on assets in a manner which met his personal needs, rather than with a regard to honest value. (Tr. Vol. II, p. 37, lines 2-8). Brian Ballard testified that he had on credit applications inflated his income to obtain credit. (Tr. Vol. II, p. 32, line 23-25).

Testimony of a witness who without hesitation admits to widespread and prevailing dishonesty on the topic should be ignored. In fact the Court itself stated that it could not place much stock in Ballard's testimony. (Tr. Vol. II, p. 37, line 2-8).

On the other hand, Jamie Ballard testified that her estimates of income were based upon her experience with regard to family expenses. (Tr. Vol. III, p. 8-9, line 7-9).

Given that the parties mortgage payment with insurance and interest was approximately \$1,800.00 per month, a conclusion that Mr. Ballard's income was \$4,000.00 per month cannot be warranted.

### **CONCLUSION**

For the reasons set forth above, the Trial Court's order with regard to separate marital property and the division thereof, and the income of the Petitioner Brian Ballard should be vacated. The Court's erroneous finding regarding the purchase price of the

peach farm is the keystone upon which all other property findings and conclusions are based. Because the keystone of the Trial Court's decision is so fatally flawed, all other conclusions flowing therefrom with regard to marital and separate property and their division must collapse.

The Court's finding with regard to Mr. Ballard's income, while admittedly a valiant effort under the circumstances cannot stand in the light of Mr. Ballard's plain unvarnished and apparently unblushing statements that he manipulates the facts to suit his purposes as necessary.

RESPECTFULLY SUBMITTED, this 15<sup>th</sup> day of November, 2002.

BLACK, STITH & ARGYLE, P.C.



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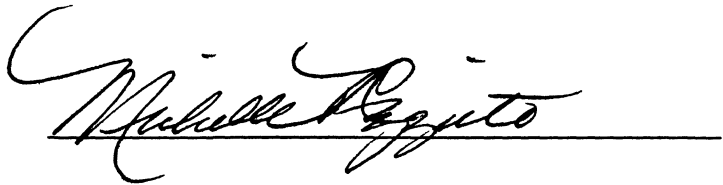
David O. Black  
Attorney for Respondent, Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 15<sup>th</sup> day of November, 2002, I caused a true and correct copy of the foregoing Reply Brief of Appellant, to be delivered via first class mail, postage prepaid, addressed to the following named person(s):

Craig C. Halls  
Attorney at Law  
333 South Main Street  
Blanding, Utah 84511

Clerk of the Court  
Utah Court of Appeals  
450 South State Street  
Salt Lake City, Utah 84114-0230

A handwritten signature in black ink, appearing to read "Michael R. Pappas", is written over a horizontal line.

# APPENDIX:

VENTH DISTRICT COURT  
Grand County

CRAIG C. HALLS #1317  
Attorney for Petitioner  
333 South Main Street  
Blanding, Utah 84511  
Telephone: 678-3333

FILED

JAN 23 2002

CLERK OF THE COURT

BY

Deputy

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
IN AND FOR GRAND COUNTY, STATE OF UTAH

---

BRIAN R. BALLARD,

DECREE OF DIVORCE

Petitioner,

VS.

JAMIE R. BALLARD,

Civil No. 0047-136

Respondent.

---

THIS MATTER came before the Court for hearing on the 13<sup>th</sup>, 14<sup>th</sup> and 28<sup>th</sup> days of November, 2001. The Petitioner was present in person and represented by counsel, Craig C. Halls. The Respondent was present in person and represented by counsel, David O. Black. The Court heard testimony of the parties and various witnesses and reviewed evidence as provided by the parties and having heretofore entered its Findings of Fact and Conclusions of Law, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:



1. Petitioner is awarded a Decree of Divorce, severing the bonds of matrimony existing between the parties to become final immediately upon entry of the same in the registry of actions.

2. Respondent is awarded the care, custody and control of the minor children, subject to Petitioner's right of visitation pursuant to U.C.A. §30-3-35.5 for children under 5 and U.C.A. §30-3-35, et seq. for children over 5 years of age.

3. Petitioner is ordered to pay child support in the amount of \$756 per month for a period of 36 months, at which time the support shall be recalculated based upon Respondent's current income, being not less than \$1000 per month if she is not working.

4. Petitioner is ordered to pay alimony in the amount of \$750 per month for a period of 36 months, at which time the alimony shall be reduced to \$250 per month for an additional 36 months. Alimony in any amount shall cease at such time as the Respondent remarries, cohabitates or dies, pursuant to U.C.A. §30-3-3.5(8-9).

5. The parties are ordered to pay one-half of all medical, dental and like expenses incurred on behalf of the minor children.

6. The parties are ordered to pay one-half of all work or school related child care expenses.

7. Petitioner is awarded the income tax exemptions for the minor children.

8. The Petitioner is awarded the peach farm property and 13 water shares as his premarital property, free and clear from any claim of the Respondent, said property is more particularly described as:

City of Moab County of Grand all of PLAT A & B,  
BALLARD SUBDIVISION

9. The Respondent is awarded the marital residence, which includes \$60,000 in equity in the home, and should be ordered to pay the property tax and insurance incurred in connection with the home. At such time as the marriage settlement set forth below is paid in full, the Respondent shall also be responsible for making the house payment.

10. The Petitioner is ordered to pay to Respondent a marriage settlement in the amount of \$110,000; said amount is to be paid within 18 months from November 28, 2001, at no interest.

11. Petitioner is ordered to pay the house payment until such time as the marriage settlement is paid in full. Petitioner

shall be entitled to reduce the marriage settlement by the principal portion of each house payment made.

12. The Petitioner is ordered to assume and discharge the marital obligations to-wit: the obligation on the ranch, the improvement lien, the obligations to Bonneville, Frontier, the tax lien, the obligations on the credit cards up to \$7,000 and the Eldon Ray Judgment.

13. The personal property of the parties shall be divided as follows:

A. Petitioner shall receive the following:

Freezer  
Chopping block  
Pizza oven  
Steak fryer  
Fruit scales  
Chief Joseph and Icabod Crane paintings  
Ballard Farms Egg carton  
Porter Rockwell painting  
Two dutch oven  
One-half of antique farm equipment  
Blue tractor  
Antique wagon  
Oak table  
Michael's gun cabinet  
.22 rifle and shotgun  
Petitioner's photographs  
All construction tools  
Antique license plate collection  
Lantern  
Pickup truck

B. The Respondent shall receive the following:

Home  
One-half of antique farm equipment  
Household furniture and furnishings acquired  
during the marriage  
Ford Explorer  
4-wheeler  
Camp Chef burner

14. The Petitioner is awarded all of the assets of Grand Valley Construction and the excavation business, together with all tools, equipment and machinery, and including any of those items which are on the property of Respondent's father, free and clear of any claim of the Respondent.

15. The Petitioner is awarded the ranch property free and clear of any claim of the Respondent, which property is more particularly described as follows:

T28S, R25E, SLBM  
Section 10: ~~E½E½SE½~~  
Section 11: ~~W½NW½SW½SE½; SE½SW½; W½SW½~~  
Section 14: ~~N½NE½NW½NW½; N½N½NE½NW½~~

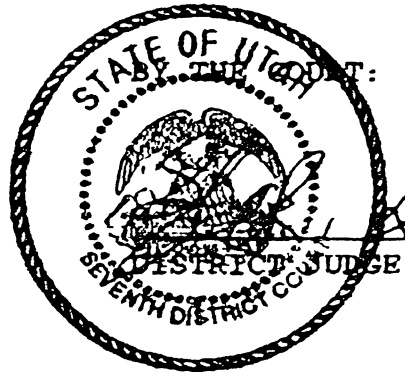
Excepting therefrom an undivided ½ interest in all oil, gas, and other minerals. Subject to all restrictions, easements, and Rights-of-Way, however evidenced

16. Neither party is awarded attorney's fees, except Respondent has incurred attorney fees in the amount of \$12,500.00 to Black, Stith & Argyle and \$4826.00 to Randall L. Skeen, which amounts shall be paid by Petitioner to Respondent's counsel

respectively out of the payments required to be made by  
Petitioner to Respondent pursuant to paragraph 10 above.

17. Each of the parties is ordered to facilitate the  
transfer of title to the various properties or to remove any  
encumbrances or liens either has placed upon any of the property  
including the property sold to Dan Holyoak.

DATED this 17th day of January, 2002.



CRAIG C. HALLS #1317  
Attorney for Petitioner  
333 South Main Street  
Blanding, Utah 84511  
Telephone: 678-3333

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

IN AND FOR GRAND COUNTY, STATE OF UTAH

---

BRIAN R. BALLARD,

Petitioner,

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

vs,

JAMIE R. BALLARD,

Civil No. 0047-136

Respondent.

---

THIS MATTER came before the Court for hearing on the 13<sup>th</sup>, 14<sup>th</sup> and 28<sup>th</sup> days of November, 2001. The Petitioner was present in person and represented by counsel, Craig C. Halls. The Respondent was present in person and represented by counsel, David O. Black. The Court heard testimony of the parties and various witnesses and reviewed evidence as provided by the parties. Therefore, being fully advised in the premises, now makes and enters its

## FINDINGS OF FACT

1. The Court finds that the parties are residents of Grand County, State of Utah, and were for a period in excess of three months immediately prior to the commencement of this action.

2. The Court finds that the Respondent is a fit and proper person to have the care, custody and control of the minor children awarded to her, subject to Petitioner's right of visitation pursuant to the statutory guidelines as a minimum.

3. The parties have been separated for a period in excess of one year, have differences with regard to finances, discipline of stepchildren and other matters and there is no chance of reconciliation.

4. The Court finds that for the purpose of child support the income of the Petitioner is \$4000 per month and the income of Respondent is zero. Petitioner is currently paying child support for other children and the income available for the payment of child support in this action is \$3167.00 per month.

5. The Court finds if the Respondent is not working on December 1, 2004, her income shall then be imputed at \$1000 per month or if she is working then her current income shall be used in recalculating child support, not less than minimum wage.

6. The Court finds that the Petitioner should be ordered to pay child support in the amount of \$756 per month for both children for a period of 36 months, beginning November, 2001, at which time the support shall be recalculated as set forth above.

7. The Court finds that the Respondent has the following monthly expenses: groceries, \$325; electricity, \$80; gas, \$100; clothing, \$100; transportation, \$200; telephone, \$50; property tax \$150; insurance, \$40.

8. The Court finds Respondent needs \$1250 per month to meet her necessary expenses.

9. The Court finds that based upon the income and expenses of the parties, the Petitioner should be ordered to pay spousal support in the amount of \$750.00 per month for a period of 36 months at which time the alimony shall be reduced to \$250 per month for an additional 36 months. Alimony in any amount shall cease at such time as the Respondent remarries, co-habitates or dies, pursuant to U.C.A. §30-3-3.5(8-9).

10. The Court finds that the temporary support as ordered by this Court on March 6, 2001, is excessive and the child and spousal support as ordered herein shall be retroactive to March 6, 2001. Thus, the child support obligation from March, 2001, through October, 2001, should have been \$6048.00; the spousal



support for the period of March through October, 2001 should have been \$6000, for a total of \$12,048.00. Any arrearage of child and spousal support shall be limited to the difference of the amount paid by Petitioner and \$12,048.00.

11. The Court finds that neither of the parties has insurance available through employment and each should pay one-half of all out of pocket expenses on behalf of the minor children for medical and dental care.

12. Each of the parties should pay one-half of all work or school related child care expenses incurred on behalf of the minor children.

13. The Court finds that the Petitioner brought certain real property into the marriage, which property is referred to as the farm or peach farm, together with 13 water shares. With relation to such property, the Court finds:

A. That the funds used to purchase the farm are traceable from Petitioner's previous marriage settlement; Petitioner has kept the property solely in his name, except for those parcels which were sold or traded, the proceeds of which were comingled; the remaining property known as the peach farm has not been co-mingled;

B. The Petitioner originally paid \$240,000 from premarital assets for the farm and water shares and there has been no substantial increase in the value of the property; any appreciation in the value of the property is due to market forces; the present value of the farm is essentially the same as when purchased when reduced by the outstanding debt owing thereon and the parcels sold.

C. The Respondent has made no significant contribution to the farm which has resulted in any enhancement of value;

D. The documentation or evidence presented by Respondent does not reflect sufficient effort on her part so as to cause an increase in the value of the property;

E. The Court believed the testimony of the water master and the receipts for the purchase of the trees and this evidence did not support Respondent's claim to have contributed significant effort on the farm;

F. The peach farm and water shares described as:

City of Moab County of Grand all of PLAT A & B,  
BALLARD SUBDIVISION

are Petitioner's premarital property and should not be included as marital assets;

G. Petitioner is obligated to pay the debt owing on the peach farm as premarital debt.

14. The Court finds that the marital residence has a value of \$220,000.

15. The Court finds that the ranch property of approximately 134 acres which is located on the LaSal Mountains has a value of \$1500 per acre, based in part upon the sale of subdivided lots sold from the original parcel; the cabin is valued at \$60,000.

16. The Court finds that Grand Valley Construction has a value of \$120,000.

17. The Court finds that the total marital assets have a value of \$600,000.

18. The Court finds that the marital debts and obligations of the parties are as follows:

Home -	\$160,000
Business -	0
Ranch	84,000
Improvement lien	9,000
Bonneville	2,190
Frontier	4,973
Tax Lien	2,793
Credit Cards	7,000
Eldon Ray Judgment	12,164

19. The Court finds that the total marital debt is \$282,000.

20. The Court finds that the parties have net assets to be distributed of \$318,000.

21. The Court finds that each party is entitled to \$159,000 in marital assets.

22. The Court finds that the Respondent is entitled to the marital residence and the \$60,000 equity in said residence. She shall be responsible for payment of the property tax and insurance on the home.

23. The Court finds that the Respondent is entitled to an additional \$99,000 in marital assets;

24. The Court finds that the Petitioner has offered to pay an additional \$10,000 to Respondent if the LaSal property is left intact.

25. The Petitioner should be ordered to pay to Respondent as a marriage settlement the sum of \$110,000 to be paid within 18 months from November 28, 2001 with no interest; the marriage settlement shall be reduced by the amount of the house payments made by Petitioner as set forth below.

26. The Petitioner should pay the house payment until such time as the entire marriage settlement is paid in full.

27. The Court finds that the division of personal property as set forth by the parties is reasonable. As no values were placed upon the individual items, the Court finds that the division is equal in monetary terms. The personal property shall be divided as follows:

A. Petitioner shall receive the following:

Freezer  
Chopping block  
Pizza oven  
Steak fryer  
Fruit scales  
Chief Joseph and Icabod Crane paintings  
Egg carton  
Porter Rockwell painting  
One dutch oven  
One-half of antique farm equipment  
Blue tractor  
Antique wagon  
Oak table  
Michael's gun cabinet  
.22 rifle and shotgun  
Petitioner's photographs  
All construction tools  
Antique license plate collection  
Lantern  
Pickup truck

B. The Respondent shall receive the following:

Home  
One-half of antique farm equipment  
Household furniture and furnishings acquired  
during the marriage  
Ford Explorer  
4-wheeler  
Camp Chef burner

27. In addition to the personal property to be awarded to the Petitioner, he should be awarded all of the business assets of Grand Valley Construction and the excavation business, including all tools, equipment and machinery and any personal property, including any of those items which are on the property of Respondent's father.

27. Petitioner shall be allowed to deduct the amount of principal on each house payment from the marriage settlement.

28. Respondent shall be responsible for making the house payment when the Petitioner has paid the marriage settlement.

30. The Petitioner should be awarded the ranch property and cabin, free and clear of any claim of the Respondent, said property is more particularly described as:

T28S, R25E, SLBM

Section 10:~~E $\frac{1}{2}$ E $\frac{1}{2}$ E $\frac{1}{2}$ SE $\frac{1}{4}$~~

Section 11:~~W $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ ;SE $\frac{1}{4}$ SW $\frac{1}{4}$ ;W $\frac{1}{2}$ SW $\frac{1}{4}$~~

Section 14:~~N $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ ;N $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$~~

Excepting therefrom an undivided  $\frac{1}{2}$  interest in all oil, gas, and other minerals. Subject to all restrictions, easements, and Rights-of-Way, however evidenced

29. The Respondent may have a lien on the ranch property to secure the payment of the marriage settlement and shall release said lien when the entire amount, less the credit for the principal portion of the house payments, has been paid in full.

30. The Petitioner is entitled to the pickup truck and the Respondent is entitled to the 4-wheeler, without any reduction to either party's share of marital assets.

31. Neither of the parties are entitled to attorney's fees.

32. Dan Holyoak purchased two lots from the parties and has paid for said lots. The parties should be ordered to do whatever is necessary and reasonable to transfer title to the property or to remove any encumbrances or liens either has placed upon the property.

Based upon the foregoing Findings of Fact, the Court now makes and enters its:

#### CONCLUSIONS OF LAW

1. Petitioner is entitled to a Decree of Divorce, severing the bonds of matrimony existing between the parties to become final immediately upon entry of the same in the registry of actions.

2. Respondent should be awarded the care, custody and control of the minor children, subject to Petitioner's right of visitation.

3. Petitioner should be ordered to pay child support in the amount of \$756 per month for a period of 36 months, at which time the support shall be recalculated based upon Respondent's current

income, being not less than minimum wage, or income imputed at \$1000 per month if she is not working,

4. Petitioner should be ordered to pay alimony in the amount of \$750 per month for a period of 36 months, at which time the alimony shall be reduced to \$250 per month for an additional 36 months. Alimony in any amount shall cease at such time as the Respondent remarries, cohabitates or dies, pursuant to U.C.A. §30-3-3.5(8-9).

5. The parties should be ordered to pay one-half of all medical, dental and like expenses incurred on behalf of the minor children.

6. The parties should be ordered to pay one-half of all work or school related child care expenses.

7. The Petitioner should be awarded the peach farm property and 13 water shares as his premarital property, free and clear from any claim of the Respondent. Described as:

City of Moab County of Grand all of PLAT A & B,  
BALLARD SUBDIVISION

8. The Respondent should be awarded the marital residence and should be ordered to pay the property tax and insurance incurred in connection with the home. At such time as the marriage settlement set forth below is paid in full, the



Respondent shall also be responsible for making the house payment.

9. The Petitioner should be ordered to pay to Respondent a marriage settlement in the amount of \$110,000; said amount is to be paid within 18 months from November 28, 2001.

10. Petitioner should be ordered to pay the house payment until such time as the marriage settlement is paid in full. Petitioner shall be entitled to reduce the marriage settlement by the principal portion of each house payment made.

11. The Petitioner should be ordered to assume and discharge the marital obligations to-wit: the obligation on the ranch, the improvement lien, the obligations to Bonneville, Frontier, the tax lien, the obligations on the credit cards and the Eldon Ray Judgment.

12. The personal property of the parties shall be divided as set forth in the Findings of Fact.

13. The Petitioner should be awarded all of the assets of Grand Valley Construction and the excavation business, together with all tools, equipment and machinery and including any of those items which are on the property of Respondent's father, free and clear of any claim of the Respondent.

14. The Petitioner should be awarded the ranch property free and clear of any claim of the Respondent. Described as:

T28S, R25E, SLBM

Section 10:~~E $\frac{1}{2}$ E $\frac{1}{2}$ E $\frac{1}{2}$ SE $\frac{1}{4}$~~

Section 11:~~W $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ ; SE $\frac{1}{4}$ SW $\frac{1}{4}$ ; W $\frac{1}{2}$ SW $\frac{1}{4}$~~

Section 14:~~N $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ ; N $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$~~

Excepting therefrom an undivided  $\frac{1}{2}$  interest in all oil, gas, and other minerals. Subject to all restrictions, easements, and Rights-of-Way, however evidenced

15. Neither party should be awarded attorney's fees.

16. Each of the parties should be ordered to facilitate the transfer of title to the various properties or to remove any encumbrances or liens either has placed upon any of the property.

DATED this \_\_\_\_ day of December, 2001.

BY THE COURT:

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DISTRICT JUDGE

mitted upon the affidavit of the petitioner with the approval of the court.

(c) If the petitioner and the respondent have a child or children, a decree of divorce may not be granted until both parties have attended the mandatory course described in Section 30-3-11.3, and have presented a certificate of course completion to the court. The court may waive this requirement, on its own motion or on the motion of one of the parties, if it determines course attendance and completion are not necessary, appropriate, feasible, or in the best interest of the parties.

(d) All hearings and trials for divorce shall be held before the court or the court commissioner as provided by Section 78-3-31 and rules of the Judicial Council. The court or the commissioner in all divorce cases shall enter the decree upon the evidence or, in the case of a decree after default of the respondent, upon the petitioner's affidavit.

(2) The file, except the decree of divorce, may be sealed by order of the court upon the motion of either party. The sealed portion of the file is available to the public only upon an order of the court. The concerned parties, the attorneys of record or attorney filing a notice of appearance in the action, the Office of Recovery Services if a party to the proceedings has applied for or is receiving public assistance, or the court have full access to the entire record. This sealing does not apply to subsequent filings to enforce or amend the decree. 1997

#### 30-3-4.1 to 30-3-4.4. Repealed.

1990

#### 30-3-5. Disposition of property — Maintenance and health care of parties and children — Division of debts — Court to have continuing jurisdiction — Custody and parent-time — Determination of alimony — Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children;

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders; and

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) (a) In determining parent-time rights of parents and visitation rights of grandparents and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a parent-time or visitation schedule a provision, among other things, authorizing any peace officer to enforce a court-ordered parent-time or visitation schedule entered under this chapter.

(5) If a petition for modification of child custody or parent-time provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(6) If a petition alleges substantial noncompliance with a parent-time order by a parent, or a visitation order by a grandparent or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation or parent-time right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation or parent-time.

(7) (a) The court shall consider at least the following factors in determining alimony

(i) the financial condition and needs of the recipient spouse;

(ii) the recipient's earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support;

(iv) the length of the marriage;

(v) whether the recipient spouse has custody of minor children requiring support;

(vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and

(vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (7)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the

efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

(f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(g) (i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this Subsection (7).

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

(h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

(8) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage or death of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(9) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person. 2001

### **30-3-5.1. Provision for income withholding in child support order.**

Whenever a court enters an order for child support, it shall include in the order a provision for withholding income as a means of collecting child support as provided in Title 62A, Chapter 11, Recovery Services. 1997

### **30-3-5.2. Allegations of child abuse or child sexual abuse — Investigation.**

When, in any divorce proceeding or upon a request for modification of a divorce decree, an allegation of child abuse or child sexual abuse is made, implicating either party, the court, after making an inquiry, may order that an investigation be conducted by the Division of Child and Family Services within the Department of Human Services in accordance with Title 62A, Chapter 4a. A final award of custody or parent-time may not be rendered until a report on that investigation, consistent with Section 62A-4a-412, is received by the court. That investigation shall be conducted by the Division of Child and Family Services within 30 days of the court's notice and request for an investigation. In reviewing this report, the court shall comply with Section 78-7-9. 2001

### **30-3-5.5, 30-3-6. Repealed.**

1991, 1993

### **30-3-7. When decree becomes absolute.**

(1) The decree of divorce becomes absolute:

(a) on the date it is signed by the court and entered by the clerk in the register of actions if both the husband and wife have a child or children have completed after mandatory course for divorcing parents as Section 30-3-11.3 except if the court waives that requirement, on its own motion or on the motion of either party, upon determination that course attendance requirements are not necessary, appropriate, for the best interest of the parties;

(b) at the expiration of a period of time that the court specifically designate, unless an appeal or other proceedings for review are pending; or

(c) when the court, before the decree becomes absolute, finds sufficient cause otherwise orders.

(2) The court, upon application or on its own motion, if good cause shown, may waive, alter, or extend a period of time before the decree becomes absolute, not to exceed six months from the signing and entry of the decree. 1994

### **30-3-7.5. Revocation of death benefits by divorce or annulment.**

(1) Upon the entry of a decree of annulment or divorce on and after May 3, 1999, any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked. A death benefit prevented from passing to a former spouse by this section shall be paid as if the former spouse had predeceased the decedent. The payor of any death benefit shall be discharged from all liability upon payment in accordance with the terms of the contract providing for the death benefit, unless the payor receives written notice of the entry of decree under this section prior to payment.

(2) The term "death benefit" includes any payments under a life insurance contract, annuity, qualified retirement plan or individual retirement, compensation agreement, or other contract designating a beneficiary of any right, property, or money in the form of a death benefit.

(3) This section does not apply:

(a) to the extent a decree of annulment or divorce from the bond of matrimony, or a written agreement of the parties provides for a contrary result as to specific death benefits; or

(b) to any trust or any death benefit payable to or under any trust. 1999

### **30-3-8. Remarriage — When unlawful.**

Neither party to a divorce proceeding which dissolves their marriage by decree may marry any person other than the spouse from whom the divorce was granted until it becomes absolute. If an appeal is taken, the divorce is not absolute until after affirmance of the decree. 1988

### **30-3-9. Repealed.**

1969

### **30-3-10. Custody of children in case of separation or divorce — Custody consideration.**

(1) If a husband and wife having minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate.

(a) In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties.

(b) The children may not be required by either party to testify unless the trier of fact determines that extenuating circumstances exist that would necessitate the testimony of the children be heard and there is no other reasonable method to present their testimony.